Exhibit 30

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PETERSEN ENERGÍA INVERSORA, S.A.U. and
PETERSEN ENERGÍA, S.A.U.,

Plaintiffs,

-against-

ARGENTINE REPUBLIC and YPF S.A.,

Defendants.

ETON PARK CAPITAL MANAGEMENT, L.P.,
ETON PARK MASTER FUND, LTD., and
ETON PARK FUND, L.P.,

Plaintiffs,

-against-

ARGENTINE REPUBLIC and YPF S.A.,

Defendants.

Case Nos.:

1:15-cv-02739-LAP
1:16-cv-08569-LAP

REBUTTAL EXPERT REPORT OF PROFESSOR ALEJANDRO M. GARRO
December 3, 2021

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I. QUALIFICATIONS, PURPOSE OF REPORT, AND MATERIALS CONSIDERED

1. I submit this declaration at the request of counsel for Petersen Energía Inversora S.A.U. and Petersen Energía S.A.U. (collectively, "Petersen" and "Petersen Plaintiffs") and Eton Park Capital Management, L.P., Eton Park Master Fund, Ltd., and Eton Park Fund, L.P. (collectively, "Eton Park" and "Eton Park Plaintiffs," and together with Petersen, the "Plaintiffs"), which have requested my opinion on certain questions of Argentine law raised in the declarations submitted by Dr. Rafael Manóvil on behalf of Argentina and on behalf of YPF on September 24, 2021.[1]

2. I incorporate by reference my prior declarations in this case, including my statement of qualifications and list of materials considered.[2] Exhibit A lists additional materials that I considered in forming my opinions, other than those previously disclosed.

3. Unless noted otherwise, this declaration relies on facts drawn from the complaints filed by the Plaintiffs in this case (the "Complaints"),[3] as well as on those facts referred to in the documents submitted by the parties and listed in my previous declarations. For the purposes of this declaration, I also rely on the analysis of the facts and issues adopted by this Court[4] and by

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[1] Expert Report of Rafael M. Manóvil on behalf of YPF, dated Sept. 24, 2021 ("Manóvil YPF Report") and Expert Report of Rafael M. Manóvil on behalf of the Republic of Argentina, dated Sept. 24, 2021 ("Manóvil ROA Report").

[2] Decl. of Professor Alejandro M. Garro, Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 1:15-cv-02739-LAP (S.D.N.Y. Dec. 6, 2019), ECF No. 132 ("2019 Garro Declaration") and Expert Report of Professor Alejandro M. Garro, dated Sept. 24, 2021 ("2021 Garro Decl.").

[3] *See* Compl., Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 1:15-cv-02739-LAP (S.D.N.Y. Apr. 8, 2015), ECF No. 1 ("Petersen Complaint"); Compl., Eton Park Capital Management, L.P. v. Argentine Republic, No. 1:16-cv-08569-LAP (S.D.N.Y. Nov. 3, 2016), ECF No. 1 ("Eton Park Complaint"), collectively cited as the "Complaints."

[4] *See* Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 15-CV-2739 (LAP), ECF No. 46, 2016 WL 4735367 (S.D.N.Y. Sept. 9, 2016), and Petersen Energía Inversora S.A.U. v. Argentine Republic, No. 15 CIV. 2739 (LAP), 2020 WL 3034824, at *12 (S.D.N.Y. June 5, 2020), ECF No. 161 ("*Petersen I*").

the Second Circuit[5] when deciding whether U.S. federal courts could entertain subject matter jurisdiction over this case.

II. SUMMARY OF CONCLUSIONS

4. As with my prior declaration of December 2019, I respond to Dr. Manóvil's opinions on Argentine law. I summarize my conclusions in this section, and elaborate on them in the subsequent sections of my declaration.

5. According to Dr. Manóvil, the tender-offer requirements in the bylaws of YPF S.A. were not triggered until May 2014, when Argentina acquired formal title to the Repsol shares. This conclusion ignores the plain language of the Bylaws, which required a tender offer once Argentina acquired "control" "by any means," regardless of whether or when Argentina finally settled with Repsol and acquired formal title to its shares. Dr. Manóvil also misapplies Argentine contract law principles by focusing on the abstract meaning of the word "acquisition" in isolation, ignoring not only surrounding words such as "control" and "by any means," but also the context and intent behind the Bylaws. As a civil-law jurisdiction, Argentine law does not adopt the "parol evidence" rule. Rather, Argentine contract interpretation rules direct courts to ascertain the mutual intent of the parties through the text, context, and purposes of the relevant contract provisions. The text, context, and purposes of the tender-offer requirements support the conclusion that the tender-offer obligation was triggered by Argentina's exercise of control of more than 49% of YPF's shares.

6. Dr. Manóvil further contends that Plaintiffs' claims in this case are governed not by the general rules regarding civil liability for contract breach set forth in the Civil Code but instead by the Argentine Companies Law ("ACL"). That conclusion mischaracterizes the

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[5] Petersen Energía Inversora v. Argentine Republic, 895 F.3d 194 (2nd Cir. 2018) ("*Petersen II*").

relationship between the Civil Code and the ACL. Under Argentine law, the Civil Code, as a general statute, applies unless it is clearly displaced by specialized legislation such as the ACL. The relationship between the Civil Code and the ACL is similar to the relationship between the common law and statutes in U.S. law: to displace the common law, a statute must do so clearly. And Argentine courts, like U.S. courts, do not strain to find conflicts between two statutes, but instead strive to interpret them harmoniously. The ACL does not address the breach-of-contract claims Plaintiffs assert here, let alone contradict the Civil Code. Thus, the ACL does not displace the Civil Code's liability rules for purposes of this action. Defendants are liable to Plaintiffs for breach of contract under the Civil Code.

7. Dr. Manóvil argues that the ACL must govern here because the YPF Bylaws are a "plurilateral organization contract," which is true, but he understates and misrepresents the binding force of a multi-party agreement such as the bylaws of a company. Plurilateral contracts give rise to binding obligations between and among the parties thereto, and breaches of those obligations are subject to the Civil Code's general liability rules. None of the authorities Dr. Manóvil cites stands for the proposition that the ACL exclusively governs all actions involving organizations that could be called "plurilateral," let alone that the ACL forecloses civil liability for breaches of obligations in plurilateral contracts that cause injury.

8. Contrary to Dr. Manóvil's argument, Plaintiffs can pursue monetary damages for contract breach under the Civil Code. The Civil Code provides a damages remedy for breach of contract, and nothing in the ACL provides otherwise. Nor is it correct that the Civil Code limits Plaintiffs to specific performance rather than damages; to the contrary, the Civil Code gives *the plaintiff* the option to choose between specific performance and damages. This rule differs from the approach of the common law tradition to remedies for breach of contract, according to which

specific performance lies only if damages are inadequate. Unlike the common law, civil law systems in general are more protective of the plaintiff's right to require the obligor to perform. But that rule does not deprive the plaintiff of the right to elect damages instead. I cite numerous Argentine courts that have awarded monetary compensation when the plaintiff has sought it instead of specific performance. And in this case, specific performance would not be practicable or possible anyway.

9. Dr. Manóvil is also incorrect in his contention that Section 7(h) of the Bylaws is a "penalty" clause that displaces any damages remedy for breach of the tender-offer obligation. Contrary to Dr. Manóvil's opinion, Section 7(h) is not a penalty clause as that term is understood in Argentina, for it does not intend to punish nonperformance or delay in performance nor provide a reasonable estimate of compensation in case of breach. Dr. Manóvil's attempt to characterize Section 7(h) of the Bylaws as the exclusive remedy is also at odds with the purposes of penalty clauses, namely, not only to coerce the obligor to perform but also, like liquidated damages clauses at common law, to relieve an injured party of the burden of proving damages. Finally, a penalty clause can never limit liability in the context of an intentional (or willful) contractual breach.

10. Dr. Manóvil's opinion that Plaintiffs could not sue without first putting Argentina or YPF in default for the breach does not apply to this case. Here, Defendants unambiguously repudiated any obligation to tender. They did so publicly and proudly the day after the enactment of the Intervention Decrees. A formal notice of default would have been a futile formality. Under those circumstances, Argentine law exempts plaintiffs from any requirement to put the obligor in default before bringing a suit for damages.

11. Finally, YPF is liable for breaching the Bylaws, and Dr. Manóvil is wrong to suggest otherwise. Under Argentine law, YPF is a separate juridical entity that owed duties to its shareholders under the Bylaws. The Bylaws imposed on YPF both an "obligation to do" (i.e., to enforce the tender-offer obligation) and an "obligation not to do" (i.e., not to allow Argentina to exercise control of the company without making the tender offer). Both obligations were intended to protect the minority shareholders in the event of a takeover. But YPF did not comply with those obligations. To the contrary, acting through an "intervenor" and a "vice intervenor" appointed by Argentina, YPF declared it would never willingly comply with those obligations. YPF thus clearly breached its obligations under the Bylaws.

III. DISCUSSION

A. Argentina breached its tender-offer obligation when it took control of YPF

12. Counsel for the Plaintiffs request my opinion as to Dr. Manóvil's argument that the tender-offer obligation was not triggered (and there was thus no breach) until May 2014, when Argentina acquired formal *title* to the Repsol shares.[6] Dr. Manóvil does not challenge that Argentina had an obligation to comply with the tender-offer requirements in the bylaws of YPF S.A. ("YPF Bylaws" or "Bylaws"), nor does he dispute that Argentina breached that obligation.[7] Rather, Dr. Manóvil premises his argument on the theory that Argentina's expropriation triggered the obligation to make a tender offer because "*[t]he term 'acquisition' ordinarily means acquiring title to something, owning it.*"[8] Dr. Manóvil's interpretation, i.e., that

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[6] Manóvil ROA Report, ¶¶ 7, 57-66.

[7] *See Petersen II*, 895 F.3d at 205, addressing whether Argentina's breach of the YPF Bylaws caused a direct effect in the United States ("*Argentina does not challenge the district court's conclusion that its breach of the bylaws' tender offer requirements caused a direct effect in the United States. And we agree with that conclusion because those provisions required Argentina to tender for ADRs listed on the NYSE . . . .*").

[8] Manóvil ROA Report, ¶ 57.

Argentina's acquisition of formal legal title to the shares, rather than the acquisition of the exercise of actual control over those shares, triggered its obligation to make a tender offer, rests on a misreading of the relevant subsections of Section 7 of the YPF Bylaws. It also ignores, in violation of basic principles of contract interpretation under Argentine law, the context and the purpose of the tender-offer requirements. These points are discussed in turn below.

13. One of the basic principles of contract interpretation of Argentine law calls for the reading of text in context, considering the contract as a whole, rather than from words in isolation.[9] Moreover, as a general rule, Argentine law – and civil law jurisdictions in general – tends to emphasize the "common intention" of the parties.[10] That is, language is read in context to effectuate the parties' reasonable expectations. Argentine courts and doctrine have long agreed that such common intention can be established taking into account all circumstances, resorting to extrinsic evidence if necessary.[11] Another canon of contract interpretation under

[9] *See* Article 1064 Civil and Commercial Code of Argentina, Law No. 26.994, effective as of Aug. 1, 2015 (*see* Law No. 27.077), *available at* http://www.saij.gob.ar/docs-f/codigo/Codigo_Civil_y_Comercial_de_la_Nacion.pdf (hereinafter the "Unified Code" or CCC"): Contextual interpretation. Contract clauses must be interpreted one by the others and giving to them the appropriate sense to the entire act. (*Interpretación contextual. Las cláusulas del contrato se interpretan las unas por medio de las otras, y atribuyéndoles el sentido apropiado al conjunto del acto*.)

[10] There is agreement that what counts, ultimately, is the agreement of the parties, but in the many cases in which such intention cannot be ascertained, the interpreter must search for the meaning a reasonable person in the shoes of that party would give to the terms of the contract, in light of the wording and all other relevant circumstances known to him. *See, generally*, A. Rouillon, 1 Codigo de Comercio. Anotado y comentado 454-460 (2005) ("Rouillon, Codigo de Comercio Anotado").

[11] In contrast to the common law approach, trying to stick to the wording of the contract as long as possible and only exceptionally admitting extrinsic evidence to establish whether the agreement has been amplified or modified, the typical civilian approach is to rely on such evidence in order to ascertain what the parties meant. *See, e.g*, Art. 218(4) Commercial Code of Argentina of 1862, Law No. 2637, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/105000-109999/109500/texact.htm (hereinafter "ComC" or "Commercial Code"), referring, inter alia, to the conduct of the parties after the contract has been concluded as a most relevant criterion to interpret the terms of the contract. *See id.* ("The conduct of the parties following the execution of the contract, relating to the point in discussion, shall be the best explanation of what the parties meant at the time the contract was concluded") ("*Los hechos de los contrayentes, subsiguientes al contrato, que tengan relación con lo que se discute, serán la major explicación de la intención de las partes al tiempo de celebrar el contrato*").

Argentine law is that contracts must be interpreted in good faith.[12] One of the corollaries of the good-faith requirement in contract interpretation is that it would be inappropriate to attribute to its terms a meaning which would defeat the purpose of the rights of the parties under the contract.

14. Here, both the context and the purpose of the tender-offer requirement point to the taking of control, rather than the taking of title, of the shares as the event triggering the obligation to tender. To start, Section 28(A) of the Bylaws, which extends the tender-offer requirement of Sections 7(e) and 7(f) to Argentina (specifically identified as the potential acquirer of rights in the shares), provides that the obligation to make a tender offer applies "*to all acquisitions made by the National Government, whether directly or indirectly, by any means or title,*[13] *of shares or other securities of the company*," if "*as a consequence of such acquisition, the National Government* ***becomes the owner, or exercises control of****, shares of the Corporation*" representing greater than 49% of YPF's shares. The verb "*to acquire*," in both English and Spanish, may refer to the acquisition of formal legal ownership of title or to obtaining possession or control of the shares. Here, as a matter of textual interpretation, the

[12] Article 1198 of the Civil Code of Argentina, effective as of Jan. 1, 1871, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/105000-109999/109481/texact.htm (hereinafter "Civil Code" or "CC") ("*Los contratos deben celebrarse, interpretarse y ejecutarse de buena fe y de acuerdo con lo que verosímilmente las partes entendieron o pudieron entender, obrando con cuidado y previsión . . . .*"). *See also* Art. 961 CCC: "Good Faith. Contracts must be entered into, interpreted and performed in good faith. They obligate not only to what is formally stated but to all consequences that may be deemed comprised by them, with the scope that any contracting careful and foresight party may have been obligated." (*"Buena fe. Los contratos deben celebrarse, interpretarse y ejecutarse de buena fe. Obligan no sólo a lo que está formalmente expresado, sino a todas las consecuencias que puedan considerarse comprendidas en ellos, con los alcances en que razonablemente se habría obligado un contratante cuidadoso y previsor*").

[13] The original Spanish version of the YPF Bylaws at Section 7(c) refers to "*by any means or title*" (*por cualquier medio o título*), which has also been translated into English as "*by any means or instrument.*" *See Petersen II*, 895 F.3d at 200; *see also* AR00012549, Bylaws of YPF Sociedad Anónima (Spanish) (2010) ("YPF Bylaws"). The phrase "*por cualquier medio o título*" translates to "*by any means or title*," but I note, for the reasons discussed below, that my opinions remain the same regardless of which translation is used.

rights in the shares whose acquisition were made subject to the tender-offer requirement are unequivocally those rights in the shares allowing Argentina to execute "any *Control Acquisition*" of the company.[14] The YPF Bylaws expressly refer to Argentina "*exercis[ing] control*" over the shares "*by any means*" as a condition precedent to the acquirer's takeover obligation.[15] That is, the text of Section 28(A) shows that the intent of the parties was that the tender-offer requirements would be triggered if Argentina took control of the company by any means, not by acquiring formal title of the shares, as Dr. Manóvil suggests.

15. The language acquiring "*control*" of, rather than taking "*legal title*" to, the shares is key to determining whether Argentina breached the tender-offer obligation, and shows that the Defendants were in breach of the YPF Bylaws as of April 16, 2012. This conclusion results not only from the textual meaning of Section 28(A) of the Bylaws, but it is also consistent with the context provided by Sections 7(d) and 7(h) surrounding the expression ". . . *becomes the owner, or exercises control of, shares of the Corporation*."

16. For one thing, the heading of Section 7(d) of the YPF Bylaws is the "taking of control" (*[t]oma de control*), defining the transactions that trigger the tender-offer requirements as "acquisitions *of control*" ("*[a]dquisiciones de control*").[16] It was by virtue of Argentina's

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[14] This term was used in the prospectus filed with the SEC in connection with the initial public offering ("IPO") ("*. . . [u]nder the [YPF's] By-laws,* ***in order to acquire a majority of [YPF's] capital stock*** *. . . the Argentine Government first would be required to make a cash tender offer . . . [a]ny* ***Control Acquisition*** *carried out by the Argentine Government other than in accordance with th[at] procedure . . . will result in the suspension of the voting, dividend and other distribution rights of the shares so acquired . . .*"). YPF Sociedad Anónima U.S. IPO Prospectus Form F-1 dated June 28, 1993, Ex. B to the Decl. of Michael Paskin in Supp. Of Defs. Mot. To Dismiss for Forum Non Conveniens, Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 1:15-cv-02739-LAP (S.D.N.Y. Aug. 30, 2019), ECF No. 112-2, at 13 and 84, and Dep. of Diego Pando Ex. 23 ("YPF IPO Prospectus").

[15] YPF Bylaws Sections 7 and 28.

[16] YPF Bylaws Section 7(d) (exempting "*acquisitions by the person already holding, or the person already exercising control of, shares*" exceeding 50% of YPF's stock).

Decree 530/2012[17] and Decree 532/2012[18] (collectively referred to as the "Intervention Decrees"), rather than by paying Repsol's compensation through the expropriation process, that Repsol's rights of control over its shares were taken over by Argentina, and it was by virtue of Argentina's exercise of those rights that Argentina took control of the Board and the management of YPF. Thus, the Intervention Decrees, allowing Argentina to take over the control of the company, constituted the operative "acquisition" of the rights of the shares within the meaning of the YPF Bylaws, even though taking formal title to the shares did not occur until the completion of the expropriation process.

17. Section 7(h) also reinforces the conclusion that the YPF Bylaws' tender-offer obligation focuses on the "Control Acquisition"[19] of the shares, rather than on the acquisition of formal title to the shares. Section 7(h) states that an acquirer that obtains shares without making a required tender offer should be deprived of the voting rights to those shares until it divests itself of either direct or indirect *control* of those shares.[20]

18. This conclusion is also bolstered by the context provided by surrounding language in Section 28(A) itself, referring to the National Government's potential acquisitions "*by any means or title*." Here the term "acquisition" is clearly not limited to acquisition of formal ownership or *title*, because the obligation to make a tender offer under Section 28(A) arises if Argentina *either* "becomes the owner" "*or*" "exercises control of" the requisite percentage of

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[17] *See* Decree 530/2012, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/196331/norma.htm ("Decree 530").

[18] *See* Decree 532/2012, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/196327/norma.htm ("Decree 532").

[19] YPF IPO Prospectus at 82, 84.

[20] *See* YPF Bylaws Section 7(h) ("*until such shares of stock are sold, in the case the purchaser has obtained the direct control of YPF*, *or* ***until the purchaser loses the control of the YPF's parent company, if the takeover has been indirect***") (emphasis added).

YPF's shares.[21] This reading of the YPF Bylaws' tender-offer requirement, centered on the acquisition of "control," rather than formal title to the shares, is consistent with the opinion of the Second Circuit.[22] It is also consistent with Argentine law on interpretation of contracts, as elucidated by Professor Rovira when discussing the practical consequences following the taking of control, as opposed to the formal acquisition of title.[23]

19. Dr. Manóvil's contrary interpretation – i.e., that the Bylaws required Argentina to acquire formal title to the shares through the completion of the expropriation process, rather than taking actual control over those shares, in order to acquire Repsol's 51% stake in YPF – rests on a misreading of the Bylaws, ignoring their context as well. Dr. Manóvil's view disregards the most basic principle of contract construction under Argentine law, shared by most Western legal systems, that contracts should be interpreted in order to effectuate the intention of the parties.[24] Simply put, construing the YPF Bylaws in conformity with Argentine law, it was by virtue of the Intervention Decrees, divesting Repsol of its rights as YPF's majority shareholder, rather than

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[21] YPF Bylaws Section 28(A) (emphasis added).

[22] *See Petersen II*, 895 F.3d at 206, referring to the acquisition of a "*control position*" as triggering the tender offer requirement (". . . section 28(A) compels Argentina to make a tender offer in accordance with the procedures set forth in the bylaws if 'by *any means* or instrument' it 'becomes the owner [of], *or exercises the control of*,' at least 49% of YPF's capital stock") (second emphasis added).

[23] Decl. of Dr. Alfredo L. Rovira, Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 1:15-cv-02739-LAP (S.D.N.Y. Oct. 19, 2015), ECF No. 46, ¶ 31 ("2015 Rovira Decl."), referring to the distinctions drawn by Section 28(A) of the Bylaws ("*do[es] not turn only on formal stock purchases or transfers of title, but also on the more practical measure of control*").

[24] *See* Art. 1198 CC (quoted above). *See also* Art. 1061 CCC: Common Intention. The contract must be interpreted in accordance with the common intention of the parties and the principle of good faith. (*Intención común. El contrato debe interpretarse conforme a la intención común de las partes y al principio de la buena fe*.").

through the acquisition of legal title to the shares, that Argentina was allowed to assume those rights and take control of YPF and its board of directors.[25]

20. Dr. Manóvil does not dispute that the purpose of the tender-offer obligations is to protect minority shareholders under the YPF Bylaws, providing them with a compensated exit if Argentina were to regain *control* of YPF.[26] These takeover protections against Argentina's attempt to regain **control** of the company are at the core of Sections 7 and 28 of the YPF Bylaws and form the basis of this action for breach of contract. Given that foreign investors' main concern was Argentina's reacquisition of ***control***, Dr. Manóvil's interpretation of Section 28(A), focusing on whether and when Argentina obtained formal title to shares, finds no support in the text of the Bylaws and its meaning under Argentine rules on contract interpretation.

21. If the takeover protection intended by the tender-offer obligation was meant to protect minority shareholders, providing them with a compensated exit in case Argentina were to reacquire control of YPF, Dr. Manóvil's interpretation that Argentina's obligation does not arise until the expropriation process is completed with the formal acquisition of the shares would lead to absurd results and defeat the purpose of the tender-offer requirements. The perverse consequence of this view is revealed if Argentina could obtain control of the company and then delay indefinitely the expropriation process so as to prevent shareholders from obtaining compensation. Indeed, by the time Dr. Manóvil states the tender-offer obligation was triggered, in May 2014, more than two years after the Intervention Decrees, the Eton Park Plaintiffs had

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[25] *See* Decree 530, Art. 3; *see also* Manóvil ROA Report, ¶ 85 ("*the June 4, 2012 Shareholders' meeting . . . allowed the Republic to be counted for the quorum and to vote the occupied shares*").

[26] *See Petersen II*, 895 F.3d at 199-201, describing the Defendants' steps to entice investors to participate in YPF's IPO, including the amendments they introduced to the Bylaws for the purpose of protecting investors against Argentina's attempts to renationalize the company.

sold most of their shares and the Petersen Plaintiffs had lost them as a result of the Intervention Decrees themselves.[27] This interpretation of the Bylaws is in conflict with the basic tenet that contracts ought to be interpreted in good faith, i.e., to effectuate the parties' expectations.[28]

B. Plaintiffs' Breach Of Contract Claim Is Governed By The Civil Code, Not By The Argentine Companies Law

22. As I explained in my previous declarations, a company's bylaws are an enforceable contract.[29] I also explained that an action for breach of contract, which is the action brought by the Plaintiffs before this Court, as well as the remedies aimed at redressing such breach, including an action for monetary damages, are governed by the Civil Code.[30] Dr. Manóvil does not disagree with those basic principles of Argentine law, but, for various reasons, he claims that they do not apply to this case.

23. Dr. Manóvil argues that claims under corporate bylaws are necessarily "corporate" claims governed by the Argentine Companies Law ("ACL") to the exclusion of the Civil Code.[31] He also claims that corporate bylaws constitute a special type of contract, a "*plurilateral organization contract*," which arguably would not permit a shareholder to bring a claim under the Civil Code for breach of the corporate bylaws against another shareholder or

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[27] *See also* Petersen Complaint, ¶ 46; Eton Park Complaint, ¶ 41.

[28] The standard of "good faith" in the interpretation of contracts, set forth in Art. 1198 of the Civil Code, also applies to business transactions as a result of the remission to the Civil Code by Art. 207 ComC. *See* Rouillon, Codigo de Comercio Anotado at 454.

[29] 2019 Garro Decl., ¶ 30; 2021 Garro Decl., ¶ 9.

[30] 2021 Garro Decl., ¶¶ 10-11.

[31] Manóvil ROA Report, ¶¶ 89-108; Manóvil YPF Report, ¶¶ 77-95.

against the corporation.[32] As discussed in the following paragraphs, on all points, Dr. Manóvil distorts the Argentine law applicable to this case.

(i) The Civil Code applies unless the ACL clearly displaces it

24. Dr. Manóvil's opinion misstates the Argentine legal framework for determining whether the ACL governs this case. The Argentine Civil Code ("CC" or "Civil Code"), as a "general statute" (*lex generalis*), is the backbone of the Argentine legal system of private law, governing both business (BxB) as well as consumer (BxC) transactions. By contrast, the ACL is a specialized statute (*lex specialis*) governing business corporations, enacted in 1972 as a supplement to the Argentine Commercial Code ("ComC" or "Commercial Code").[33] The general principle, common to legal systems sharing the civil law tradition, is that the Civil Code applies to all legal transactions (*actos jurídicos*), including business transactions, as expressed in Article 207 of the Commercial Code (of which the ACL is a part). Article 207 ComC reads:

> Art. 207 ComC: *Unless modified by this Code, the civil law applies to all matters and business transactions*.[34]

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[32] Manóvil ROA Report, ¶¶ 66-78; Manóvil YPF Report, ¶¶ 86-94. *See also* Reply Expert Rep. of Rafael M. Manóvil in Supp. Of Defs. Mot. To Dismiss for Forum Non Conveniens, Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 1:15-cv-02739-LAP (S.D.N.Y. Feb. 7, 2020), ECF No. 152, at ¶¶ 5-21, where he develops this argument in the context of the corporate claims governed by the ACL.

[33] The Argentine Companies Law, Law No. 19.550, Mar. 30, 1984, *available at* http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/25553/texact.htm (the "ACL"), was adopted in 1972, and it was incorporated as a supplementary legislation to the Commercial Code of Argentina of 1862 (which was derogated in 2015 when the Unified Code came into force).

[34] Art. 207 ComC: *El derecho civil, en cuanto no esté modificado por este Código, es aplicable a las materias y negocios comerciales*. The term "civil law" (*derecho civil*) in jurisdictions pertaining to the civil law tradition, refers to that branch of the law governing private law in general, as opposed to other, more specialized branches of private law, such as "commercial law" and "consumer law." Articles 150 and 1709 of the Unified Code establish this normative hierarchy in a more comprehensive fashion but in terms fully compatible with the principle established in Art. 207 ComC. *See* Art. 150 CCC, addressing the hierarchy of legal sources applicable to legal entities: "Applicable laws. Private legal entities incorporated in Argentina are governed by: (a) the mandatory rules of the special statute or, in default thereof, by this Code; (b) the articles of incorporation, as amended, and other organizational rules, the former prevailing over the latter in case of conflict; (c) the default rules of special laws or, in default thereof, by those of this Title. Business corporations incorporated abroad are governed by the law governing commercial companies." (Art. 150 CCC: "*Leyes aplicables. Las personas jurídicas privadas que se constituyen en la República, se rigen: a) por las normas imperativas de la ley especial o, en su defecto, de este*

25. Article 207 of the Commercial Code operates in a similar fashion to the familiar rule in American law that a statute is not presumed to alter the common law unless it does so clearly. While in the common-law tradition judicial decisions (judge-made law) establish the background principles of civil liability, in the civil law tradition, those principles and rules are codified in the Civil Code. Accordingly, the legislature can enact a specialized statute modifying the rules of the Civil Code for certain cases, but it must do so clearly, just as a legislature must clearly express its intent to displace the common law if it wishes to do so.[35]

(ii) The ACL does not displace the Civil Code with respect to Plaintiffs' claim for breach of contract

26. The ACL does not displace the Civil Code with respect to Plaintiffs' claims for breach of the tender-offer provisions of YPF's Bylaws. In fact, there is no provision of the ACL

Código; b) por las normas del acto constitutivo con sus modificaciones y de los reglamentos, prevaleciendo las primeras en caso de divergencia; c) por las normas supletorias de leyes especiales, o en su defecto, por las de este Título. Las personas jurídicas privadas que se constituyen en el extranjero se rigen por lo dispuesto en la ley general de sociedades."). Article 1709 of the Unified Code provides a comprehensive list of legal sources applicable to civil liability, seeking to sort out potential conflicts between the rules of the Unified Code (*lex generalis*) and special statutes or bodies of laws (*lex specialis*). *See* Art. 1709 CCC: "Normative hierarchy. In those cases in which the provisions of this Code were to apply together with special statutes governing civil liability, the following rules shall apply in the following order: a) the mandatory rules provided by this Code and special statutes; b) the rules agreed by the parties pursuant to the parties' autonomy; (c) the default rules of special statutes; (d) the default rules of this Code." ("*Prelación normativa. En los casos en que concurran las disposiciones de este Código y las de alguna ley especial relativa a responsabilidad civil, son aplicables, en el siguiente orden de prelación: a) las normas indisponibles de este Código y de la ley especial; b) la autonomía de la voluntad; c) las normas supletorias de la ley especial; d) las normas supletorias de este Código*."). *See*, in general, PT_GARRO_000000334, A. Fiorenza, Prelación Normativa en Materia de Responsabilidad Civil (discussing how Art. 1709 CCC should be relied upon where "the interpreter faces a situation in which not only the rules of the [Civil and Commercial] Code are to be applied, but also rules contained in other legal microsystems providing for the preventive and restitutionary role of civil liability") ("*. . . el problema que surge para el intérprete cuando se encuentra ante un supuesto en el que no sólo puede aplicar alguna de las normas contenidas en el propio Código, sino también otra u otras contenidas en los microsistemas que al igual que aquel contengan disposiciones referidas a la función preventiva y/o resarcitoria de la responsabilidad civil*").

[35] *See generally*, R. Schlesinger, Comparative Law. Cases. Text. Materials 552 (5th ed., 1988) ("*The relationship which in a civil-law country exists between basic codes and auxiliary enactments may generally be compared with the interaction, familiar to us, of common law and statutes. Quantitatively, the growth of auxiliary enactments in civil-law countries has been enormous – a fact never to be forgotten by one undertaking research on a concrete point of law. Nevertheless, the basic codes remain to the civilian, as the common law remains to us, the very core of the legal order, containing not only rules but also the general principles which give life and systematic direction to every positive norm, and to which we must turn, in particular, when we are faced with a novel or doubtful case*.").

that addresses tender offers, let alone the remedies designed to protect shareholders' rights from majority abuses. Therefore, the principles and rules of the Civil Code govern the Plaintiffs' claim for breach of YPF's Bylaws.

27. As a specialized statute, the ACL governs only *certain claims* for damages arising from disputes within a corporation, including derivative claims brought on behalf of a corporation for damage caused to the company and claims by a shareholder for damage caused to the company that only indirectly damage the plaintiff-shareholder.[36] None of those claims is at issue here. The action for damages brought by the Plaintiffs before this Court does not intend to vindicate harm suffered by YPF. Rather, Plaintiffs were directly harmed by Argentina and by YPF itself and seek monetary damages due to Defendants' failure to make and enforce a tender offer for their shares. The ACL does not address that type of claim at all, and it therefore does not displace or modify the provisions of the Civil Code governing remedies for breach of contract.

(iii) Despite its "plurilateral" nature, the bylaws of a corporation give rise to binding commitments

28. Dr. Manóvil argues that the ACL must govern here because the YPF Bylaws are a "plurilateral organization contract," attaching to this characterization the conclusion that any claim for breach of the Bylaws is necessarily a "corporate law claim" governed by the ACL.[37] I have also addressed in a previous declaration the differences between bilateral and plurilateral

[36] The ACL governs other causes of action involving a breach of fiduciary duties by corporate officers, but none of those claims are at issue here. *See*, for example, claims for damages against an administrator resigning untimely or who intentionally abandons his duties (Art. 130 ACL); claims seeking to establish liability in connection with the incorporation of a closed corporation (Art. 183 ACL); claims brought against the company and members of the board of directors for breaching the preemptive right of shareholders to subscribe newly issued shares (Art. 195 ACL).

[37] Manóvil ROA Report, ¶¶ 66 et seq.

contracts, pointing out that the plurilateral nature of the Bylaws does not negate the binding nature of the obligations arising out of such multi-party agreements.[38] The contractual nature of corporate bylaws has been reaffirmed by this Court and the Second Circuit,[39] and the network of contractual promises embodied in the YPF Bylaws includes the obligation of the Defendants, vis-à-vis other YPF shareholders, to conduct and enforce a tender offer. The intended offeree and beneficiary of the offer is not the company, but rather those shareholders who are entitled to consider whether to accept the offer and exit the corporation.

29. None of the authorities cited by Dr. Manóvil supports his sweeping statement that all claims involving a corporation or the breach of corporate bylaws are exclusively governed by the ACL. As pointed out before, the ACL governs specific claims involving breaches of corporate bylaws, without displacing those provisions of the Civil Code applicable to breach of contract in general.[40] None of the authorities cited by Dr. Manóvil supports his conclusion that it follows from the plurilateral nature of corporate bylaws that a disappointed beneficiary of the Defendants' obligations to make and enforce a tender offer cannot bring an action for damages for breach of contract. Dr. Manóvil's quotes from Argentine legal scholars are taken out of context, for such opinions simply describe the unique features of corporate bylaws as a plurilateral organizational contract, without even addressing whether a plaintiff injured by a

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[38] 2021 Garro Decl., ¶ 11, n.9.

[39] *Petersen I,* 2016 WL 4735367, at *5 n.3 ("*a company's . . . bylaws in substance are a contract between the corporation and its shareholders and among the shareholders*"), quoting M.J. Savitt. Inc. v. Savitt, No. 08 CIV. 8535 (DLC), 2009 WL 691278, at *9 (S.D.N.Y., Mar. 17, 2009); *Petersen II*, 895 F.3d at 199, referring to the amended YPF Bylaws as "*the contract governing the relationship among YPF, Argentina (in its capacity as a shareholder), and other YPF shareholders*."

[40] 2021 Garro Decl., ¶¶ 11-12.

breach of corporate bylaws may or may not bring an action for monetary damages under the Civil Code.[41]

30. Neither the cases nor the scholarly works cited by Dr. Manóvil support his conclusion. Gatti v. Bulad, for example, involved a claim by shareholders against a board member who had allegedly stolen property belonging to the corporation.[42] The Argentine court dismissed the complaint for damages on the ground that corporate property was at stake and the

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[41] *See, e.g.*, Manóvil ROA Report, ¶ 68, n.91, citing AR00078917-AR00078926, I. Halperín, 1 Curso de Derecho Comercial 202-205 (2d ed. 1971) (discussing in general the legal nature of the corporate bylaws), referring to certain characteristics of the bylaws due to their nature as a "plurilateral organizational contract", as opposed to bilateral contracts. Halperín refers to the absence in plurilateral contracts of the remedy of termination or avoidance, but at no point does he exclude an action for damages resulting from a violation of the corporate bylaws; *see also* Manóvil ROA Report, ¶ 75, n.101, citing Halperín, referring to the absence of a "functional synallgma" in plurilateral contracts, at no point stating that a shareholder may not sue another shareholder as a result of a breach of the corporate bylaws; Manóvil ROA Report, ¶ 76, n.103, citing a passage in which Halperín addresses the absence of the *exceptio non adimpleti contractus* in plurilateral organizational contracts (a defense allowing a non-breaching party, in reciprocal obligations to withhold performance in case the other party fails to perform). *See also* Manóvil ROA Report, ¶ 75, n.100, citing AR00079043-AR00079046, C. A. Vanasco, 1 Sociedades Comerciales 97-99 (2006), stating that "plurilateral organizational contracts" are not subject to the same "*general rules applicable to breaches of bilateral contracts*," pointing out that a breach of the bylaws does not entitle the aggrieved party to an action of termination (*resolución*), yet recognizing that shareholders owe duties to each other ("*[E]sos derechos y obligaciones se tienen y asumen, primero, respecto de y hacia los demás partícipes y respecto de la sociedad . . . .*"). *See also* Manóvil ROA Report, ¶ 75, n.100, citing AR00078913-AR00078916, E. Zaldívar et al., 1 Cuadernos de Derecho Societario 36-37 (1973). This reference to Zaldívar is cited for the proposition that "*plurilateral contracts do not create specific bilateral obligations between shareholders.*" However, Zaldívar does not make such a statement. Quite to the contrary, Zaldívar acknowledges that under the corporate bylaws shareholders hold reciprocal duties and obligations towards the corporation as well ("*las obligaciones recíprocas, que se crea entre los contratantes y entre éstos y la persona moral que nace a raíz del acto constitutivo*"). *See also* Manóvil ROA Report, ¶ 77, n.105, citing AR00079027-AR00079031, H. Roitman, 1 Ley de Sociedades Comerciales. Comentada y Anotada 14, n.38 (2d ed., 2011) and AR00079053-AR00079054, S. Balbín, Ley General de Sociedades revisada, ordenada y comentada 4 (2016), both being cited in support of the proposition advanced in the text that "*Plaintiffs lack standing under Argentine law to bring their claims directly against Argentina as a co-shareholder of YPF. There is no decision I am aware of that has permitted one shareholder to sue another shareholder directly to claim for noncompliance with a bylaw provision*." None of Roitman's comments supports the proposition in the text. Roitman's citation refers to the legal nature of a shareholder's contribution to the company, whereas Balbín's citation refers, in general, to the differences between bilateral contracts and corporate bylaws.

[42] *See* Manóvil ROA Report, ¶ 77, citing AR00079047-AR00079052, Gatti v. Bulad, CNCom, Division A, 22 Oct. 1999, 88 El Derecho 693, at 698 ("Gatti").

damage suffered by the plaintiff shareholders was merely indirect,[43] so that they may pursue a derivative action against the board member under the ACL.[44]

31. The Gatti case is obviously inapposite to the claim Plaintiffs brought before this Court. According to the terms of the Complaints, Plaintiffs are not asserting the liability of the board members nor seeking to recover damages for harm caused to corporate property, unlike the plaintiff shareholders in Gatti. Instead, they are seeking damages for the injuries they sustained "directly" from Defendants' contractual breaches, rather than vindicating the harm sustained by YPF. Specifically, Plaintiffs seek damages resulting from their failure to receive the cash tender-offer price they should have received under the Bylaws – damage suffered only by Plaintiffs as beneficiaries of the tender-offer requirements, not damage suffered by the company as a whole.[45] Plaintiffs also alleged damages from the loss of value of their stock and inability to receive dividends,[46] which are not less "direct" than the damage caused by failure to receive the tender-offer price under the Bylaws.

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[43] Gatti: "The individual action of liability may be brought only for the damage suffered by the shareholder, who lacks standing to bring this action on account of the damage he suffered indirectly, as part of the damage suffered by the Company") ("*La acción individual de responsabilidad sólo puede referirse a los daños personales sufridos por el accionista, pero éste carece de legitimidad para interponerla cuando se trata de un daño que sufre indirectamente, integrante del daño mayor que sufre la sociedad*").

[44] Gatti: "If the acts and omissions imputed to the defendant implicate the breach of its obligations in his role of member of the board of directors of the corporation, directly affecting corporate property and affecting the shareholders only indirectly, it can be concluded that the latter lack standing to bring an individual action of liability, so that they are relegated to bring a corporate action, exhausting the means and complying with the requirements set forth in [the ACL] Law No. 19.550" ("*Si los actos u omisiones que se le imputan al demandado, configuran el incumplimiento de las obligaciones asumidas como director de la sociedad, que afectaron directamente el patrimonio societario y sólo indirectamente a los socios, cabe concluir que estos últimos carecen de legitimidad para interponer la acción individual de responsabilidad y sólo pueden promover la acción social, agotando los recursos y presupuestos que el régimen de la ley 19.550 exige*").

[45] *See* Petersen Complaint, ¶¶ 42-47, 59-63, 71, 81; Eton Park Complaint, ¶¶ 41, 51, 57-60, 64, 74.

[46] *See id.*

32. Dr. Manóvil's report fails to take notice of these facts. Moreover, Dr. Manóvil fails to bring to the Court's attention the many cases in which an individual plaintiff, including a shareholder, brought suit against another shareholder and/or a company on account of harm suffered as a result of a breach of the company's bylaws and in which Argentine courts resorted to the remedies provided under the Civil Code. This issue is addressed next.

C. Plaintiffs Are Entitled To Seek Monetary Damages Under The Civil Code

33. As explained in my previous declarations, the Civil Code establishes rules for civil liability for breach of contracts in general, including the breach of corporate bylaws, rules which are familiar to those acquainted with contract law in common law jurisdictions.[47] As stated before, the bylaws set forth binding contractual obligations whose breach may be vindicated not only through the causes of action regulated under the ACL,[48] but also under the rules of the Civil Code applicable to obligations in general and, in particular, contractual liability remedies available for breach of contract.

34. It bears repetition that the ACL does not displace or modify the Civil Code provisions on damages for breach of the corporate bylaws. Neither does the ACL address the breach of a tender-offer obligation or, in fact, preclude an action for damages for breach of contract against a person who, in violation of the YPF Bylaws, fails to issue a timely tender offer before taking over the company. [49] Even those corporate claims expressly governed by the ACL are subject to the Civil Code rules insofar as the ACL does not provide for the requirements to be

[47] 2021 Garro Decl., ¶ 13.

[48] For example, suing corporate officers for breach of their fiduciary duties (Arts. 59 and 274 ACL), challenging the validity of shareholders' resolutions, eventually pursuing the shareholders' liability for damages (Arts. 251 and 254 ACL).

[49] *See* 2021 Garro Decl., ¶ 12.

met in order to establish liability of the corporate officers and shareholders and the measure of damages to be recovered in case there is a breach.

35. For example, Article 59 of the ACL provides for the joint and several liability of corporate officers for the damage caused by the breach of their fiduciary duties (a standard expressed in Argentine law as "*loyalty and diligence of a good businessman*").[50] Article 254 of the ACL provides in turn for the joint and several liability of shareholders who voted in favor of corporate resolutions held null and void, for the consequences resulting from those resolutions.[51] Questions relating to the scope of liability attached to joint and several obligations, the requirements to be met to establish such liability, and the quantum of damages are not settled by the ACL. Instead, these issues are governed by the general civil liability rules found in the Civil Code.

36. I have examined the authorities allegedly espousing Dr. Manóvil's opinion and none of those authorities stands for the proposition that a breach of a tender-offer obligation in corporate bylaws cannot give rise to a contract claim.[52] In contrast, I can attest that in an action for damages by a shareholder against the company, other shareholders and corporate officers, the

[50] Art. 59 ACL: "Administrator's Diligence. Company's administrators and representatives must carry on their duties with loyalty and diligence of a good businessman. Those who fail to comply with their obligations shall be unlimitedly jointly and severally liable for the damages resulting from their acts and omissions" (*Diligencia del administrador: responsabilidad. Los administradores y los representantes de la sociedad deben obrar con lealtad y con la diligencia de un buen hombre de negocios. Los que faltaren a sus obligaciones son responsables, ilimitada y solidariamente, por los daños y perjuicios que resultaren de su acción u omisión*).

[51] Art. 254 ACL: "Shareholders' liability. Shareholders who voted in favor of resolutions declared null and void are unlimitedly jointly and severally liable for their consequences, without prejudice of the liability that my correspond to directors, statutory auditors and members of the surveillance committee." (*Responsabilidad de los accionistas. Los accionistas que votaran favorablemente las resoluciones que se declaren nulas, responden ilimitada y solidariamente de las consecuencias de las mismas, sin perjuicio de la responsabilidad que corresponda a los directores, síndicos e integrantes del consejo de vigilancia*).

[52] *See* Manóvil ROA Report, ¶¶ 89-119; Manóvil YPF Report, ¶¶ 77-102.

court's findings on both liability and damages routinely rest on the provisions of the Civil Code.[53]

37. The ACL does not preclude minority shareholders from pursuing the remedies for breach of contract under the Civil Code.[54] Given the panoply of remedies offered under Article 505 of the Civil Code, the mere fact that some of the YPF shareholders sought in-kind remedies before Argentine courts, such as Repsol[55] and in San Martín, José y otro v. Estado Nacional, is not indicative that other minority shareholders may not seek monetary relief.[56]

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[53] *See, e.g.*, Gutiérrez Enedina et al. v. Neumáticos Gutiérrez S.A., C.Nac.Com., Div. A, 16 Oct. 2012, TR LALEY AP/JUR/4023/2012. Despite the fact that the action for damages was brought beyond the 3-month period of preemption prescribed in Art. 251 ACL, the court held the defendant shareholder nevertheless liable under Art. 953 CC (providing for the nullity of a transaction that is "illegal" o *contra bonos mores*) and in violation of Art. 1071 CC (providing for liability under the civil-law doctrine of "abuse of rights" (*abuso del derecho*)). In numerous cases in which the plaintiffs resorted to an action for damages against members of the board of directors and managers of the corporation, Argentine courts necessarily resorted to the provisions of the Civil Code on damages in order to determine the scope of liability of the corporate officers and the measure of the recovery. *See, e.g.*, Delvalle Senen v. Constructora Mir S.R.L. et al., CNTrab., Div. IV, 7 Nov. 2002 (holding that the liability of the directors and the measure of recovery of damages must be "*integrated into the general theory of damages provided by the Civil Code*"); Iraldi et al., v. Godoy, CNCom, Div. E, 31 Oct. 2006 (to the effect that "*in order to establish the liability of the managers of the corporation it does not suffice to establish the breach of their legal obligations and of the bylaws, for it is necessary to show that the requirements of the general theory of civil liability has been met . . .*"); M.S. M. v. C.M. de T. et al., Court of Appeals Civ. Com. Azul, Div. II, 28 Nov. 2019 ("*Because the bylaws of the corporation fail to provide for the liability of corporate officers on account of the failure to comply with their duties, it must be concluded that this issue should have been settled in light of the specific mechanisms provided by the substantive law applicable to civil cases (Arts. 33, 35, 36, 40 et seq. of the Civil Code) . . . .*").

[54] As previously noted the Civil Code's liability rules for breach of contract apply unless they are clearly displaced by the ACL. *See* Art. 207 ComC, and Arts. 150 and 1709 of the Unified Code. Nothing in the ACL displaces the rules of the Civil Code allowing a plaintiff to obtain a damages remedy for breach of the tender-offer obligations contained in the corporate bylaws. This reading of the interplay between the remedies in the ACL and the Civil Code is supported by the numerous court cases where Argentine courts have distinguished between the 3-year period of limitations applicable to intra-corporate claims governed by Article 848(1) of the Commercial Code and actions for breach of contract subject to the general 10-year limitation period governed by Article 4023 of the Civil Code. *See, e.g.*, Zullo, Norberto v. Kehoe, Roberto E. et. al, CNCom., Div. A, 22 July 2008. *See also* R. L. Fernandez, 3 Codigo de Comercio de la Republica Argentina: Comentado 651-652 (1950); C. J. Zavala Rodríguez, 6 Código de Comercio Y Leyes Complementarias: Comentados y Concordados 247-248 (1976).

[55] Indeed, Dr. Manóvil fails to mention that Repsol brought an action for damages against Argentina in the United States, which concluded in a monetary settlement. *See* Compl., Repsol et al. v. Argentina, No. 1:12-cv-03877-LAP, ECF No. 1 (S.D.N.Y. May 15, 2012). *See also* Manóvil ROA Report, ¶¶ 52-55.

[56] AR00072289-AR00072414, court file of De San Martín, José y otro c. Estado Nacional-Poder Ejecutivo s/Proceso de Conocimiento, 4201/2012. It is noteworthy that in this case Argentina sought the dismissal of the case alleging that, rather than the commercial courts, the case should have been brought before the administrative courts (*tribunals en lo contencioso-administrativo*) because the plaintiffs' gravamen rested on the expropriation of their shares by the national government. *See* San Martin, Jose y otros at AR00072332 ("The claim involves the

38. Last but not least, if the only remedy available to the Plaintiffs involved remaining in the company, limited to pursuing nonmonetary remedies under the ACL, such a result would leave the Plaintiffs with no meaningful chance of recovery in this proceeding in the United States. Once again, it is worth bearing in mind that, not only as alleged in the Complaints but also acknowledged by the Second Circuit, the main purpose of the tender-offer obligation was to entice potential investors to participate in YPF's initial public offering. This prompted Argentina and YPF to introduce an amendment to the YPF Bylaws for the purpose of guaranteeing shareholders the right to a compensated exit from the company in case Argentina were to regain its control.[57] The practical effect of Dr. Manóvil's position would render nugatory the core purpose of the tender-offer obligation: to ensure a compensated exit from the company if Argentina reacquired control of YPF.

D. Argentine Law Allows The Plaintiffs To Sue For Monetary Damages, Rather Than Specific Performance, For Breach Of The Tender-Offer Obligation

39. In my previous declaration, I brought Article 505 of the Civil Code to the attention of the Court,[58] which explicitly provides for a list of remedies available to the party

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provisions of the Bylaws, which establish that whomever wishes to acquire title or control of certain percentages of capital stock, should . . . conduct a tender offer. The complaint in my opinion cannot be resolved applying commercial or corporate law, since the expropriation at issue arises under our own National Constitution.") (*La prestación involucra las disposiciones del Estatuto, que establecen que la persona que desee adquirir la titularidad o el control de ciertos porcentajes del capital social, deberá . . . realizar una oferta de adquisición. El reclamo en mi opinión no puede ser resuelto aplicando normas del derecho comercial o societario, pues la facultad de expropiación cuestionada surge de nuestra propia Constitución Nacional*.).

[57] As alleged in the Complaints (Petersen Complaint, ¶¶ 16-26 and Eton Park Complaint, ¶¶ 19-31), the Defendants sought to make YPF attractive to foreign investors, amending the YPF Bylaws by introducing the tender-offer requirements in Section 7, providing that if any person (explicitly including Argentina in Section 28) sought to acquire control of YPF, such person would be required to make a tender offer at a generous price. *See also Petersen II*, 895 F3d at 199 ("*In particular, the bylaws were amended to incorporate protections for investors from (1) hostile takeovers and (2) attempts by Argentina to renationalize the company*.").

[58] *See* 2021 Garro Decl., ¶ 13.

aggrieved by the breach, listing specific performance, the right to secure performance by a third party at the cost of the obligor, and the right to seek monetary compensation by way of damages:

> Art. 505 CC: *The effects of obligations with respect to the obligee are: (1) provide him with the legal means for compelling the obligor to undertake what he promised; (2) to obtain performance by another, at the cost of the obligor; (3) to obtain the pertinent compensation . . . .*[59]

40. My declaration also underscored, citing Article 1083 of the Civil Code,[60] that the remedial scheme of Argentine law gives the obligee the right to seek specific performance or compensatory damages – in contrast to the common-law approach of ordering specific performance only in exceptional circumstances.[61]

41. Dr. Manóvil posits that the only remedies available to Plaintiffs for breach of the tender-offer obligation are in-kind remedies (specific performance).[62] Relying on Article 889 of the Civil Code,[63] Dr. Manóvil argues that monetary compensation may become available only if

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[59] Art. 505 CC: "*Los efectos de las obligaciones respecto del acreedor son: (1) Darle derecho para emplear los medios legales, a fin de que el deudor le procure aquello a lo que se ha obligado; (2) Para hacérselo procurar por otro a costa del deudor; (3) Para obtener del deudor las indemnizaciones correspondientes* . . . ." The obligee's right to damages is more clearly articulated in Article 1716 of the Unified Code. *See* Art. 1716 CCC: "Duty to repair. The breach of the duty not to harm another, or the failure to perform an obligation, gives rise to the obligation to repair the damage caused pursuant to the rules of this Code." ("*Deber de reparar. La violación del deber de no dañar a otro, o el incumplimiento de una obligación, da lugar a la reparación del daño causado, conforme con las disposiciones de este Código*.").

[60] Art. 1083 CC: "Indemnification for the damage suffered shall consist of restoring the situation to the status quo ante, unless such restoration is impossible, in which case the indemnification shall be fixed in money. **The injured party may also choose to seek monetary damages**." ("*El resarcimiento de daños consistirá en la reposición de las cosas a su estado anterior, excepto si fuera imposible, en cuyo caso la indemnización se fijará en dinero.* ***También podrá el damnificado optar por la indemnización en dinero***.") (emphasis added).

[61] 2021 Garro Decl., ¶ 20.

[62] *See* Manóvil ROA Report, ¶¶ 96-104 and Manóvil YPF Report, ¶¶ 138-144 (contending that even if the Plaintiffs could avail themselves of a remedy for breach of contract under the Civil Code, the only relief they are entitled to seek is specific performance (a "remedy in kind"), not being entitled to seek damages without simultaneously asking for specific performance or termination (which the Plaintiffs did not request, at least expressly)).

[63] Art. 889 CC: "If performance has become impossible due to the fault of the obligor, or if he has assumed liability for an event of force majeure, whether by virtue of a clause allocating to him the risks arising from force majeure or having been put in default, the original obligation, whether an obligation to give or to do something, is converted into an obligation to pay damages." (*Si la prestación se hace imposible por culpa del deudor, o si éste se hubiese hecho responsable de los casos fortuitos o de fuerza mayor, sea en virtud de una cláusula que lo cargue con los*

performance in kind becomes impossible,[64] in which case the obligee may seek damages only as a complementary remedy to termination of the contract.[65]

42. Noticeably, in a previous declaration arguing for the exclusive jurisdiction of Argentine courts to entertain this action,[66] to which I also previously responded,[67] Dr. Manóvil also argued, ultimately unsuccessfully,[68] that Plaintiffs could only pursue in-kind remedies under the intra-corporate claims regulated under the ACL. This presentation of the Argentine law on remedies for breach of contract is wrong and inconsistent with Argentine case-law on the availability of specific performance vis-à-vis monetary damages.[69]

43. Argentine law, consistent with the general approach of the civil-law to remedies, assumes that the obligee will want the option of seeking specific performance of the obligation she was promised, and therefore the obligee is in principle entitled to seek specific

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peligros que por ellos venga, o sea por haberse constituido en mora, la obligación primitiva, sea de dar o de hacer, se convierte en la de pagar daños e intereses).

[64] *See* Manóvil ROA Report, ¶ 99 ("*In the case of a breach of an obligation, a party may only seek damages under Article 889 of the Civil Code if performance of the in-kind remedy is impossible*.").

[65] *See* Manóvil YPF Report, ¶¶ 140-141 ("*Under this principle, when a party to a contract does not perform its obligations, the undisputed rule is that the non-breaching party has only two options: either request specific performance or terminate the contract. A party who has requested specific performance may later decide to terminate the contract, but not the other way around. A claim for damages may be **brought in addition to** a claim for specific performance (to compensate for delay in performance) or for termination (for failure to receive the expected performance under the contract). However, Argentine case law and legal doctrine conclude that **there is no autonomous claim for damages available to a non-breaching party***.") (emphasis in the original).

[66] Expert Decl. of Rafael M. Manóvil, Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 1:15-cv-02739-LAP (S.D.N.Y. Aug. 30, 2019), ECF No. 115, ¶¶ 35-41.

[67] 2019 Garro Decl., *passim*.

[68] Manóvil's position was dismissed by this Court earlier in these proceedings. *See Petersen I* at *12 (S.D.N.Y. June 5, 2020) (noting that the Second Circuit already decided "*that the Republic's jurisdiction over the present action is not 'exclusive'*" (quoting *Petersen II*, 895 F.3d at 211)).

[69] *See* R.D. Pizarro & C.G. Vallespinos, 2 Instituciones de Derecho Privado. Obligaciones 203-205, especially ¶ 338(c) (stating it is up to the obligee to freely decide whether to pursue specific performance or damages as substitutionary relief).

performance.[70] In other words, Argentine law, unlike U.S. law, entitles the plaintiff to freely seek – at her choice – specific performance before requesting damages. Therefore, assuming that performance is still possible and it is not unreasonable to demand performance in kind, the obligee is entitled to hold the other party to the contract, claiming damages next to the claim for performance for the additional losses he may have suffered.[71]

44. However, notwithstanding the obligee's right to demand specific performance, he is not required to do so, as has been repeatedly held by Argentine courts.[72] Thus, even if performance by the obligor can be enforced in kind, Argentine law does not compel the obligee to request specific performance. Instead, the party aggrieved by the breach is free to pursue monetary damages, not necessarily accompanied by an express request for termination. Thus, it has been held on more than one occasion that the list of possible remedies set forth in Article 505 of the Civil Code (quoted above) does not establish a rigid hierarchy of remedies, but rather provides a sign-post from which the obligee may freely choose.[73] In those cases in which the

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[70] The principle that obligations, especially contractual obligations, as a rule can be specifically enforced, and that ordinarily it is for the obligee and not for the court to choose between specific performance and a non-specific remedy, has been adopted in the overwhelming majority of civil-law systems. *See*, in general, J.P. Dawson, Specific Performance in France and Germany, 57 Mich. L. Rev. 495 (1959); C. Szladits, The Concept of Specific Performance in Civil Law, 4 Am. J. Comp. L. 208 (1955).

[71] *See, e.g.*, L.W. A. v. S, I. H. et al, CNCiv., Div. A, 13 Oct. 2017, LL-2018-A-618; Consorcio de Propietario Marcelo T. de Alvear 2365/7 v. Pacheco Hernandez, R.A., CNCiv. Div. C, 26 June 2008, LL -2008-E-522 (in all of these cases, the plaintiff's original request for specific performance was subsequently changed to an action for damages, which the courts characterized as "equivalent in value" to specific performance or "substitutionary relief" amounting to the equivalent value (*aestimatio rei* or *valor de reposición*) of the actual performance).

[72] *See, e.g.*, Molina v. Dinamotor, CNCom., Div. E, 17 Dec. 2009, El Dial Digital, ED-DCCCII-532 (2013); Lacorte v. Sirvan, CNCiv, Div. E, 3 Nov. 2006; Consorcio de Propietario Marcelo T. de Alvear 2365/7 v. Pacheco Hernandez, R.A., CNCiv. Div. C, 26 June 2008, LL -2008-E-522; L.W. A. v. S, I. H. et al, CNCiv., Div. A, 13 Oct. 2017, LL-2018-A-618; L., G.L. v. D., O. R., CNCiv., Div. E, 6 May 2014, TR LALEY AR/JUR/19485/2014; B., E.Y. v. C., C., CNCiv., Div. G, 28 Aug. 1986, TR LALEY 70065805; Perez, R. v. Consorcio de Propietarios Edificio Barrio G. Savio, CNCiv., Div. E, 5 Aug. 1997, LL-2000-B-847; Mesiano, M. E. et al v. Otero, Sergio et al., CApel. Civ. Com. San Martin, Div. II, 5 Oct. 2010, TR LALEY AR/JUR/1470/1995.

[73] *See* Dumit, Alberto v. Villareal, Victor, Supreme Court of Mendoza, Div. I, 8 May 1968, 134 LL 100-110 (1968) ("Dumit v. Villareal") (plaintiff has the option of suing for damages instead of demanding specific performance).

obligee chooses to sue for damages rather than specific performance, either because specific performance is not practical under the circumstances or the obligee has simply lost interest in obtaining performance in kind, Argentine courts have awarded monetary compensation without the need for the plaintiff to expressly request either specific performance or termination of the contract.[74]

45. In sum, Dr. Manóvil's opinion transforms principles under Argentine law that are meant to protect the obligee into principles that harm the obligee. Argentine law grants the obligee multiple remedial options, including *the right* to seek specific performance *at his or her choosing*, unlike U.S. law, which imposes a higher burden on plaintiffs to seek this nonmonetary remedy.

46. Dr. Manóvil's opinion that the Plaintiffs' remedies are confined to enforcing the YPF Bylaws in kind is wrong as a matter of Argentine law and is baseless under the circumstances of this case. First and foremost, Plaintiffs are seeking an award of damages as the only and most practicable remedy for this Court to enforce the YPF Bylaws.[75] Second, the argument that the only remedy available to the Plaintiffs is specific performance not only distorts Argentine law on remedies for breach of contract, but also does not make sense in a case such as

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[74] In Dumit v. Villareal, the buyer sought damages for the seller's failure to deliver the promised goods. The lower court dismissed the buyer's action on the ground that it failed to demand specific performance first, arguably as required by Article 505 CC. The Supreme Court of Mendoza reversed, holding that it is up to the plaintiff buyer to choose the most suitable remedy, without having to accompany the action for damages with an express demand for the termination of the contract.

[75] As alleged in the Complaints, the Second Circuit characterized the action brought by the Plaintiffs as an action for breach of contract arguing, *inter alia*, that: "*(1) Argentina repudiated its obligation to make the tender offer in accordance with sections 7(e) and 7(f) and 28 of the bylaws, (2) YPF breached its obligation to ensure Argentina made such tender offer in light of its acquisition of Repsol's shares, and (3) YPF permitted Argentina to exercise the voting rights of Repsol's shares and other corporate governance powers in contravention of section 7 (h) of the bylaws*." *See Petersen II*, 895 F.3d at 203.

the present one in which the Plaintiffs are no longer YPF shareholders and could not tender their shares even in the event of a court-ordered tender offer.[76]

E. There Is No "Penalty" Clause In The YPF Bylaws That Overrides A Damages Claim

47. Under Argentine Law, the parties to a contract are free to agree on a stipulated sum to be paid in case of nonperformance, thus avoiding the need to prove the actual damages suffered by the obligee, similar to the use of liquidated damages clauses at common law.[77] However, clauses stipulating for the payment of a fixed sum in case of nonperformance, or in case of delay in performance, fulfill an additional purpose under Argentine law, namely, to penalize or coerce the obligor to perform its contractual obligations.[78]

48. Dr. Manóvil argues that the "*sanctions*" provided in Sections 7(h) and 28(C) of the YPF Bylaws, namely, the loss of voting and economic rights associated with a "Controlling Acquisition" in violation of the tender-offer obligations, constitute genuine "penalty clauses" under Argentine law.[79] He also characterizes the deprivation of voting rights by the offending shareholder as a "delinquency penalty" (*pena moratoria*), presumably entered into for the

[76] *See Petersen II*, 895 F.3d at 209 ("*To the extent that Argentina is suggesting that Petersen wants a court to order Argentina to conduct a tender offer now, **such argument is baseless**. Petersen's complaint does not seek a specific performance remedy. Nor could it for Petersen is no longer a YPF shareholder and therefore could not perform its obligation to tender shares in the event of a court-ordered tender offer. Restatement (Second) Contracts, Section 363, cmts. a & b (plaintiff's ability to perform its obligations under the contract is a prerequisite to a specific performance remedy).*") (emphasis added).

[77] *See* Arts. 652-666 CC. *Accord* Arts. 790-804 CCC; *see* generally, N. S. Marsh, Penalty Clauses in Contracts: A Comparative Study, 32 J. Comp. Leg. & Inst. L. (3rd serr.) 66, 72-73 (1950); I. R. Macneil, Power of Contract and Agreed Remedies, 47 Cornell L. Rev. 495 (1962).

[78] *See* Art. 652 CC: "A penalty clause is one which**, in order to ensure the performance of an obligation**, provides for a penalty or fine in case of delay or failure to perform an obligation." (*La cláusula penal es aquella en que una persona, **para asegurar el cumplimiento de una obligación**, se sujeta a una pena o multa en caso de retardar o de no ejecutar la obligación*) (emphasis added).

[79] Manóvil ROA Report, ¶¶ 105-119.

purpose of penalizing Argentina's failure to carry out a timely performance of the tender offer.[80] This time relying on Article 655 of the Civil Code, providing that the obligee can collect either the amount of the penalty or damages (but not both),[81] Dr. Manóvil argues that the "penalty" stipulated in Sections 7(h) and 28(C) of the YPF Bylaws constitutes the Plaintiffs' "exclusive remedies" for breach of the tender-offer obligations,[82] replacing any other right to damages that the Plaintiffs may have been able to assert under the Civil Code.[83] Once again, Dr. Manóvil's representation of the Argentine law on penalty clauses provides a misleading and inaccurate picture of the Argentine law.

49. Indeed, penalty clauses are valid and enforceable under Argentine law, yet, as stated before, the application of such clauses presupposes that the parties actually intended to penalize the breach of a contractual promise by imposing a sanction in case of nonperformance or delay in performance. This is evidently not the case in Section 7(h)[84] and Section 28(C)[85] of the YPF Bylaws, imposing on YPF the duty to prevent the shares acquired in violation of the tender offer obligation from voting, receiving dividends, and counting towards a quorum. These provisions do not provide any compensation to shareholders whose tender-offer rights were

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[80] Manóvil ROA Report, n.144.

[81] *See* Art. 655 CC: "The stipulated penalty or fine shall substitute the compensation for damages when the obligor has been put in default, and the obligee cannot receive any other compensation, even if he were to establish that the penalty fails to provide sufficient compensation." (*La pena o multa impuesta en la obligación, entra en lugar de la indemnización de perjuicios e intereses, cuando el deudor se hubiese constituido en mora; y el acreedor no tendrá derecho a otra indemnización, aunque pruebe que la pena no es indemnización suficiente*).

[82] Manóvil ROA Report, ¶ 108.

[83] Manóvil ROA Report, ¶ 119.

[84] YPF Bylaws Section 7(h): "*Breach of requirements: Shares of stock and securities acquired in breach of the provision of subsections 7(c) through 7(g), both included, of this section, shall not grant any right to vote or collect dividends or other distributions that the corporation may carry out, nor shall they be computed to determine the presence of the quorum at any of the shareholders' meetings of the corporation, until such shares of stock are sold, in the case the purchaser has obtained the direct control of YPF, or until the purchaser loses the control of the YPF's parent company, if the takeover has been indirect.*"

[85] YPF Bylaws Section 28(C): "*The penalties provided for in subsection (h) of Section 7 shall be limited, in the case of the National Government, to the loss of the right to vote . . . .*"

violated, and it is therefore unreasonable to construe the language in these provisions as the shareholder's only remedy for breach of the tender-offer obligation.

50. Dr. Manóvil's construction of Section 7(h) of the Bylaws and his representation of the regime of penalty clauses under Argentine law, allowing the obligor – rather than the obligee – to choose the payment of the "penalty" rather performing its promise, is at odds with the very purpose of penalty clauses, namely, to strengthen the choice Argentine law grants to the obligee to seek specific performance by pressuring the acquirer to comply with the tender-offer obligation. The purpose of a penalty clause, encouraging the actual performance of the contract is reflected in Article 658 CC, according to which, unless agreed otherwise, the obligor cannot choose to pay the penalty rather than performing:

> Art. 658 CC: *The obligor cannot be exempted from performing the obligation by paying the penalty, unless this right was exclusively reserved.*[86]

51. Even if Sections 7(h) and 28(C) of the YPF Bylaws were intended to operate as penalty clauses (which they were evidently not), Dr. Manóvil's argument that the Plaintiffs would be limited to the nonmonetary remedies consisting of the loss of voting rights and other corporate powers would be inconsistent with Dr. Manóvil's characterization of those "sanctions" as a "delinquency penalty" (i.e., intending to penalize delay in performance).[87]

52. Article 659 of the Civil Code provides the obligee the option to either pursue the remedies set forth in the clause or to seek the performance of the obligation, unless the penalty

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[86] Art. 658 CC: "*El deudor no podrá eximirse de cumplir la obligación, pagando la pena sino en el caso en que expresamente se hubiese reservado este derecho*."

[87] Manóvil ROA Report, n.144 (arguing that the sanctions provided by Section 7(h) of the Bylaws were intended to penalize the untimely performance of the tender-offer obligation).

has been established for delay or the parties have expressly agreed that the obligee is entitled to both:

> Art. 659 CC: *The obligee cannot demand the penalty and the performance of the obligation, but rather he must choose one of the two unless the penalty was stipulated merely for delay in the performance or if it has been agreed that payment of the penalty shall not extinguish the principal obligation*.[88]

53. If Section 7(h) of the YPF Bylaws was to be construed as a "delinquency penalty," as proposed by Dr. Manóvil, the Plaintiffs would be entitled to pursue either monetary damages for breach of the YPF Bylaws or the "sanctions" provided in Section 7(h) of those Bylaws, or both, in contrast to Dr. Manóvil's argument that Plaintiffs' recovery would be limited to seeking enforcement of those "sanctions."

F. Plaintiffs Were Not Required To Put Argentina or YPF In Default

54. Article 509 of the Civil Code provides that, as a general rule, a claim for breach of contract can be brought only if the obligor is put in default by a formal warning notice (*constitución en mora*).[89] This rule is subject to exceptions, such as when the time for

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[88] *See* Art. 659 CC: *Pero el acreedor no podrá pedir el cumplimiento de la obligación y la pena, sino una de las dos cosas, a su arbitrio, a menos que aparezca haberse estipulado la pena por el simple retardo, o que se haya estipulado que por el pago de la pena no se entienda extinguida la obligación principal*.

[89] Art. 509 CC: "In obligations subject to a term, the obligor's default takes place upon the expiration of that term. If the term for performance is implied by the nature and the circumstances of the obligation, the obligee must give formal notice [*interpelar*] to the obligor in order to put him in default [*para constituirlo en mora*]. In the absence of a term for performance, the court shall fix it in an expedited proceeding, unless the obligee chooses to bring together an action to fix the term for performance and for the termination of the contract, in which case the obligor shall be put in default [*quedará constituido en mora*] on the date fixed by the court for performing the obligation. If the term for performance has not been expressly agreed, it is implied by the nature and the circumstances of the obligation. In order to be exempted of liability for delay in performance, the obligor must establish that such delay cannot be imputed to him." (*En las obligaciones a plazo, la mora se produce por su solo vencimiento. Si el plazo no estuviere expresamente convenido, pero resultare tácitamente de la naturaleza y circunstancias de la obligación, el acreedor deberá interpelar al deudor para constituirlo en mora. Si no hubiere plazo, el juez a pedido de parte, lo fijará en procedimiento sumario, a menos que el acreedor opte por acumular las acciones de fijación de plazo y de cumplimiento, en cuyo caso el deudor quedará constituido en mora en la fecha indicada por la sentencia para el cumplimiento de la obligación. Para eximirse de las responsabilidades derivadas de la mora, el deudor debe probar que no le es imputable*.).

performance has been expressly or impliedly fixed by the parties or when, as I have explained in my previous declaration, the obligor or the circumstances of the case make the requirement of putting the obligor in default a futile formality.[90]

55. Referring to the requirement of putting the obligor in default, which Argentine law shares with other legal systems pertaining to the civil law tradition, Dr. Manóvil alleges that, given that the YPF Bylaws fail to provide for a fixed and clear deadline to conduct a tender offer, Argentina cannot be held liable for breach of contract due to the Plaintiffs' failure to formally summon Argentina to make a tender offer.[91] Dr. Manóvil's dictum as to the general requirement of putting the obligor in default does not apply to this case. The Defendants' contemptuous repudiation of their obligations under the Bylaws, of which Dr. Manóvil's expert reports fail to take notice, made compliance with this formality completely useless.[92]

56. I have stated in my previous declaration, with supporting authority, that Argentine courts have held that the obligee is exempted from issuing such formal warning in those cases in which the breach is serious enough to justify termination and the obligor has expressly and clearly stated that he will not perform.[93] In this case, Argentina's and YPF's unambiguous and

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[90] 2021 Garro Decl., ¶ 34.

[91] Manóvil ROA Report, ¶¶ 120-125: "*I have seen no evidence that Plaintiffs made a request to the Republic to conduct a tender offer . . . . Therefore, under Argentine law, the Republic was not delinquent in failing to comply with this alleged obligation and no consequence attaching to a delinquent obligation may be claimed by Plaintiffs against the Republic.*"

[92] *See Petersen II*, 895 F.3d at 202, taking notice of Mr.Kicillof ́s statement before the Senate on Apr. 17, 2012.

[93] *See, e.g.*, Betbeder y Cia F. v. FF. CC. de law Prov. Buenos Aires, CNCom, Div. B, 5 Aug. 1953, LL-72-480. *See also* PT_GARRO_000000392-PT_GARRO_000000405, J.J. Llambias, 1 Tratado de derecho civil. Obligacines (3d. Jan. 1, 1978) at PT_GARRO_000000403; R. D. Pizarro, La mora del deudor en el Código Civil y Comercial, 14 Mar. 2016, LL-2016-B-758, AR/DOC/532/2016; S. M. Wierzba, Régimen actual de la mora, 10 May 2017, TR LL-AR/DOC/3527/2017.

public repudiation of the obligation to tender exempted the Plaintiffs from putting the Defendants in default before bringing a suit for damages.[94]

G. YPF Is Liable For Breach of the Bylaws

57. As I have stated in my previous declarations and reiterated in this one, the corporate bylaws, despite their "plurilateral" nature, give rise to conventional obligations among the shareholders and the corporation. If the bylaws incorporate the obligation to make a tender offer as a means to protect the interest of minority shareholders, it follows that it is incumbent upon the company to abide by the terms of the bylaws in order to ensure that the tender-offer obligation is timely complied with before the acquirer takes control of the company.[95]

58. Thus, Section 7(f) of the YPF Bylaws imposes an obligation on the company, which Argentine law characterizes as an "*obligation to do*," in order to ensure that the minority shareholders and potential offerees of the tender will receive a tender offer.[96] Strengthening the protection of minority shareholders, Section 7(h) of the Bylaws imposes in turn on the company what Argentine law characterizes as an "*obligation not to do*," mandating on the company that the shares whose control was acquired in violation of the tender-offer obligations be denied the right to vote, receive dividends, and other rights pertaining to the governance of the

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[94] 2021 Garro Decl., ¶ 35 ("Mr. Kicilloff's statements, formally expressed before the Argentine Senate, to the extent they unambiguously express Argentina's and YPF's repudiation of the obligation to carry out a tender offer, would entitle the Plaintiffs to sue and recover damages from the Defendants without waiting for the time for performance to arrive . . . ."); *see also id.* n.58, referring to PT_GARRO_000000023-PT_GARRO_000000033, Argencip S.A. c. Fondo Compensador para Jubilados.

[95] *See* 2021 Garro Decl., ¶¶ 8(f), 17. *See also* 2015 Rovira Decl., ¶¶ 43-44; Decl. of Dr. Alfredo L. Rovira dated 24 Sept. 2021, ¶ 27.

[96] *See* YPF Bylaws Section 7(f) ("*Each takeover bid shall be carried out fully in accordance with the procedure set forth in this paragraph* . . .").

corporation.[97] Similarly, Section 7(d) broadly guarantees that the remaining shareholders will receive the tender offer.[98]

59. Dr. Manóvil contends that YPF had a mere "administrative role" to play in connection with the tender-offer obligation, so that YPF is not subject to any contractual obligation under its Bylaws and, in case it would be subject to any obligation towards the Plaintiffs, such obligations were not triggered in the absence of a formal notification to YPF of Argentina's intention to conduct a tender offer.[99] Dr. Manóvil's argument that YPF owed no duties to the Plaintiffs is inconsistent with the plain language of the YPF Bylaws, imposing on YPF obligations to do and not to do, and it is also inconsistent with the "plurilateral organizational nature" of the Bylaws, whose distinctive features have been already addressed in this declaration.[100]

60. Dr. Manóvil's opinion is also inconsistent with Argentine law. To the extent that a legal entity is created by virtue of the YPF Bylaws,[101] this newly created juridical person, acting through its legal representatives or board of directors, acquires obligations owed to the shareholders.[102]

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[97] *See* YPF Bylaws Section 7(h) ("*Shares of stock and securities acquired in breach of the provisions of subsections 7c) through 7g) . . . shall not grant any right to vote or collect dividends or other distributions* . . . .").

[98] YPF Bylaws Section 7(d) ("*No Company share or security . . . may be acquired either directly or indirectly, by any means or under any title unless the provisos of paragraphs e) and f) of this Section are complied with* . . . .").

[99] Manóvil YPF Report, ¶¶ 64, 74.

[100] As this Court previously recognized, the plain text of Sections 7 and 28 of the YPF Bylaws "*impose[s] liability on YPF when shares are acquired in the triggering amount absent a tender offer*." Opinion and Order issued on September 9, 2016 by the United States District Court for the Southern District of New York (Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 15 Civ. 2739 (LAP), ECF No. 46, 2016 WL 4735367 at *15 (S.D.N.Y. Sept. 9, 2016)).

[101] *See* YPF Bylaws Section 5 ("*the Corporation has full legal capacity to acquire rights, undertake obligations, and exercise any act not prohibited by the laws or these Bylaws*").

[102] *See* Manóvil ROA Report, ¶ 11 (recognizing that "*the relationships that arise from [the Bylaws] are between each shareholder* ***and the company***") (emphasis added).

61. When Argentina took control of the YPF Board of Directors by virtue of the Intervention Decrees, Argentina's Minister De Vido was installed as Intervenor and Argentina's Secretary of Economic Policy as YPF Vice Intervenor, granting them the powers of the YPF Board. As the Second Circuit recognized,[103] under Argentine law, the actions and omissions of YPF's Intervenor and Vice Intervenor – such as the failure to enforce the tender-offer obligations,[104] – gave rise to liability not only for Argentina but also for YPF itself, which became an instrumentality of Argentina.[105]

62. Pursuant to 28 U.S.C. § 1746, I, Alejandro M. Garro, declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct.

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Alejandro M. Garro
Executed on December 3, 2021

[103] The Second Circuit recognized in this case that "*every corporation is obligated to abide by its bylaws*" and, as an instrumentality of Argentina, YPF had "an obligation to enforce the tender offer provision" under the bylaws. *See Petersen II*, 895 F.3d at 210.

[104] 2021 Garro Decl., ¶ 35 ("*Mr. Kicilloff's statements, formally expressed before the Argentine Senate, to the extent they unambiguously express Argentina's and YPF's repudiation of the obligation to carry out a tender offer, would entitle the Plaintiffs to sue and recover damages from the Defendants without waiting for the time for performance to arrive* . . . .").

[105] *See Petersen II*, 895 F.3d at 210. *See also* Art. 1763 CCC: "*The legal entity shall be liable for any harm that is caused by whoever directs or manages them in the exercise of or in connection with their functions.*" It should also be borne in mind that YPF's repudiation of its obligations under its own Bylaws was perpetrated with *dolo,* not a minor point as concerns the scope of YPF's liability under Argentine law, even though it is nowhere mentioned in Dr. Manóvil's expert reports. *See* 2021 Garro Decl., ¶¶ 23-24.

Exhibit A

Exhibit A

Materials Considered

Case Documents

- Decl. of Dr. Alfredo L. Rovira, dated Sept. 24 2021 and materials relied upon.
- Expert Decl. of Rafael M. Manóvil, Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 1:15-cv-02739-LAP (S.D.N.Y. Aug. 30, 2019), ECF No. 115.
- Expert Rep. of Professor Alejandro M. Garro, Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 1:15-cv-02739-LAP (S.D.N.Y. Dec. 6, 2019), ECF No. 132.
- Expert Rep. of Professor Alejandro M. Garro, dated Sept. 24, 2021 and materials relied upon.
- Expert Rep. of Rafael M. Manóvil on behalf of the Republic of Argentina, dated Sept. 24, 2021 and materials relied upon.
- Expert Rep. of Rafael M. Manóvil on behalf of YPF, dated Sept. 24, 2021 and materials relied upon.
- Reply Expert Rep. of Rafael M. Manóvil in Supp. Of Defs. Mot. To Dismiss for Forum Non Conveniens, Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 1:15-cv-02739-LAP (S.D.N.Y. Feb. 7, 2020), ECF No. 152.
- YPF Sociedad Anónima U.S. IPO Prospectus Form F-1 dated June 28, 1993, Ex. B to the Decl. of Michael Paskin in Supp. Of Defs. Mot. To Dismiss for Forum Non Conveniens, Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 1:15-cv-02739-LAP (S.D.N.Y. Aug. 30, 2019), ECF No. 112-2, and Dep. of Diego Pando Ex. 23.

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